

IN THE COURT OF APPEALS OF TENNESSEE  
AT NASHVILLE  
JULY 17, 2008 Session

**MARILYN S. BOYD v. THOMAS H. BATES, JR.**

**Direct Appeal from the Circuit Court for Bedford County  
No. 9207 Franklin Lee Russell, Judge**

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**No. M2007-02345-COA-R3-CV - Filed August 11, 2008**

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This case arises from a post-divorce petition to modify child support. Mother/Appellant appeals, alleging that the trial court erred: (1) in relieving Husband/Appellee of one-third of the total of the children's uninsured medical expenses, (2) in applying the income shares child support guidelines, (3) in calculating Husband/Appellee's adjusted gross income, and (4) in denying Mother/Appellant's request for attorney's fees. Finding no error, we affirm.

**Tenn. R. App. P. 3; Appeal as of Right; Judgment of the Circuit Court Affirmed**

J. STEVEN STAFFORD, J., delivered the opinion of the court, in which ALAN E. HIGHERS, P.J., W.S., and HOLLY M. KIRBY, J., joined.

Van French, Murfreesboro, TN, Appellant

Barry B. White, Lewisburg, TN, Appellee

**OPINION**

Appellant Marilyn S. Boyd and Appellee Thomas H. Bates, Jr. were divorced by order of the Logan County, Kentucky Circuit Court in March 1991. In conjunction with their divorce, the parties entered into a property settlement, and child custody and visitation agreement for the two minor children born to the marriage. The divorce decree was registered as a foreign judgment in Tennessee in November 2002. Pursuant to the original child custody and visitation agreement, Mr. Bates was to pay \$677.00 per month in child support, and to "pay for any and all costs of medical and dental care which are not paid by insurance, for any reason, including but not limited to orthodontist work for said children." In January 2003, the Tennessee court awarded a judgment against Mr. Boyd for \$13,540.00 for child support arrears, with the arrearage to be paid at \$150.00 per month. The court also raised Mr. Boyd's monthly child support obligation from \$677.00 per month to \$1,000.00 per month.

In June 2003, Mr. Bates filed a petition to reduce his share of the children's uninsured medical expenses from 100% to 50% asserting that the increase in child support to \$1,000.00 per month "constitutes a significant change in circumstances such as would allow an amendment to the final decree of divorce." Ms. Boyd filed an answer and counter-complaint seeking an increase in child support and requesting a judgment against Mr. Bates for unpaid medical expenses and attorney's fees.

In December 2003, Ms. Boyd filed a petition to modify and for show cause in contempt, alleging that Mr. Boyd had failed to comply with the January 2003 order. Mr. Bates responded with a motion to show cause and amended petition regarding visitation with the children.

The trial court heard arguments on June 10, 2004. At that time, Mr. Bates moved to "amend his Petition to Amend Final Decree to include a request that child support be reduced to reflect the fact that the oldest child [would] turn eighteen on the sixteenth of June." The trial court continued the case to allow Ms. Boyd time to retain counsel." The issue of the children's uninsured medical expenses and the amount of child support to be paid was reserved for later hearing.

In December 2004, Ms. Boyd again petitioned the court for contempt against Mr. Bates for alleged failure to pay the medical expenses of the children. In February 2005, the trial court entered an agreed order stating that Mr. Bates owed \$3,300.08 in pre-June 2003 medical expenses and \$9,956.52 in post-June 2003 medical expenses. The parties agreed to brief the remaining issues and set a hearing on those issues, if necessary.

On October 23, 2006, the trial court entered an order, finding that the children's orthodontic work was a post-June 2003 expense, and ordered Mr. Bates to be responsible for two-thirds of those expenses. On December 1, 2006 the trial court ordered, upon stipulation by the parties, that Mr. Bates child support arrearage was \$10,901.88, as of June 2004. All other issues were reserved for a final hearing which was held on September 20, 2007. As the result of the hearing, the trial court entered its final order, which reads, in pertinent part, as follows:

1. Neither party is found in contempt of the Orders of this Court and this is not an appropriate case to award attorney fees to either party.
2. Medical payments due [Ms. Boyd] are \$9,941.08.
3. Child support Arrearages due [Ms. Boyd] are \$6,667.92.
4. Payments toward arrearages and child support have previously been made in the amount of (\$8,940.00).
5. All amounts due from [Mr. Bates] to [Ms. Boyd] in regard to any items of care and support of the parties' children amounts to \$7,669.00.

Ms. Boyd appeals and raises four issues for review as stated in her brief:

- I. Whether the trial court erred in reducing Dr. Bates' obligation to pay 100% of the medical expenses to 66.6% of the medical expenses.

a) Whether the trial court erred in determining that the orthodontic bills were post June 2003 expenses, thus requiring Dr. Bates to pay only two-thirds of those bills.

II. Whether the trial court erred in refusing to modify Dr. Bates' child support upward in order to be in compliance with the Child Support Guidelines.

III. Whether the trial court erred in applying the Income Shares Child Support Guidelines as opposed to the prior Child Support Guidelines thus reducing Dr. Bates child support obligation although he filed no petition for modification before or after the effective date of the Income Shares Child Support Guidelines.

IV. Whether the trial court erred in failing to award Ms. Boyd payment of her attorneys fees.

Before reaching Ms. Boyd's issues, we first address a shortcoming in her notice of appeal. Tenn. R. App. P. 3(f) governs the contents of a notice of appeal, and requires that the notice, among other things, contain a designation of "the judgment from which relief is sought." Ms. Boyd's notice of appeal states that the file date of the judgment appealed is "10/ /07." Not only is there no order in the record bearing the date of October 2007, but it also appears (from the issues raised) that Ms. Boyd is, in fact, appealing the September 20, 2007 order set out above. The Advisory Commission's comments to Tenn. R. App. P. 3(f) state:

This subdivision specifies the content of the notice of appeal. The purpose of the notice of appeal is simply to declare in a formal way an intention to appeal. As long as this purpose is met, it is irrelevant that the paper filed is deficient in some other respect....

Although this Court may not waive a parties' failure to file a timely notice of appeal, defects in the contents of the notice may be (but need not be) waived by this Court under Tenn. R. App. P. 2. Because there is no evidence that Ms. Boyd's failure to cite the proper date of the order appealed has worked any prejudice to Mr. Bate's case, and in the interest of adjudicating this case on its merits, we exercise our discretion under Tenn. R. App. P. 2 and allow this appeal to proceed.

Turning to the issues, we first note that, because this case was tried by the court sitting without a jury, we review the case *de novo* upon the record with a presumption of correctness of the findings of fact by the trial court. Unless the evidence preponderates against the findings, we must affirm, absent error of law. *See* Tenn. R. App. P. 13(d). Furthermore, when the resolution of the issues in a case depends upon the truthfulness of witnesses, the trial judge who observed the witnesses and their demeanor while testifying is in a far better position than this Court to decide those issues. *See McCaleb v. Saturn Corp.*, 910 S.W.2d 412, 415 (Tenn.1995); *Whitaker v. Whitaker*, 957 S.W.2d 834, 837 (Tenn.Ct.App.1997). The weight, faith, and credit to be given to any witness's testimony lies in the first instance with the trier of fact, and the credibility accorded will

be given great weight by the appellate court. *See id.*; *see also Walton v. Young*, 950 S.W.2d 956, 959 (Tenn.1997).

It is also well settled that this Court's review is limited to the appellate record and it is incumbent upon the appellant to provide a record that is adequate for a meaningful review. Tenn. R. App. P. 24(b). Here, the record consists only of the technical record and the exhibits introduced at the hearing. There is neither a transcript, nor a Tenn. R. App. P. 24(c) statement of the evidence. As this Court has often stated, "in the absence of a transcript or statement of the evidence, we must conclusively presume that every fact admissible under the pleadings was found or should have been found favorably to the appellee." *See, e.g., In re: Rockwell*, 673 S.W.2d 512, 516 (Tenn.Ct.App.1983) (citing *Wilson v. Hafley*, 189 Tenn. 598, 226 S.W.2d 308 (1949); *Kyritsis v. Vieron*, 53 Tenn.App. 336, 382 S.W.2d 553 (1964)).

### Medical Expenses

Ms. Boyd's argument under this issue is two-fold. First she contends that the trial court erred in reducing Mr. Bates' obligation to pay 100% of the children's uninsured medical expenses to 66.6% of those expenses. Second, she contends that, even if this reduction stands, Mr. Bates should be responsible for 100% of the orthodontia expenses because those expenses allegedly occurred prior to his filing for modification.

Mr. Bates' filed his petition to amend the final decree, requesting the court to split the children's uninsured medical expenses equally between the parties on June 13, 2003. Ms. Boyd asserts that "Dr. Bates should be equitability [sic] estopped from having his payment reduced for these expenses in view of the fact that his only reason to file the motion to amend was to avoid payment of these costs." There is no proof in the record that avoidance was Mr. Bates' motivation for filing to amend his uninsured medical expenses obligation. Rather, his petition clearly states that the trial court's January 2003 decision to increase his support obligation to \$1,000 constitutes a significant change in circumstance, which change warrants a review of the responsibility for the children's medical expenses.

Setting child support and deviations from the guidelines are matters resting in the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of discretion. *State, ex rel. Vaughn v. Kaatrude*, 21 S.W.3d 244, 248 (Tenn. Ct. App. 2000). Mr. Bates' asked that the trial court divide the children's uninsured medical costs equally between the parties. Tenn. Comp. R. & Reg. 1240-2-4-.04(d) gives guidance on the distribution of responsibility for these types of expenses:

1. The child's uninsured medical expenses including, but not limited to, deductibles, co-pays, dental, orthodontic, counseling, psychiatric, vision, hearing and other medical needs not covered by insurance are not included in the basic child support schedule and shall be the financial responsibility of both parents.

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3. If uninsured medical expenses are not routinely incurred so that a specific monthly amount cannot be reasonably established, a specific dollar amount shall not be added to the basic child support obligation but the court order shall specify that these expenses shall be paid by the parents as incurred according to each parent's percentage of income unless some other division is specifically ordered by the tribunal.

In its October 2006 order, the trial court specifically found:

Upon statements of counsel, testimony of the parties, evidence presented in open court, and the whole record in this Cause, the Court finds[:]

1. That the orthodontic work and braces are post-June 2003 medical expenses;
2. That there should be a split of post-June 2003 medical expenses, where THOMAS H. BATES would be responsible for 2/3 of the medical expenses incurred, and MARILYN S. BOYD would be responsible for 1/3 of the medical expenses incurred;

As noted above, there is no transcript of this hearing, nor any statement of the evidence. From our review of the record, and from the exhibits introduced at the hearing, we cannot conclude that the evidence preponderates against the trial court's decision to reduce Mr. Bates' obligation for medical expenses. In fact, based upon the evidence before us concerning the relative incomes of these parties, it appears that the trial court made an equitable distribution of the medical expenses in declining to make both parties responsible for one-half of the total, as requested by Mr. Bates. We cannot find that the trial court abused its discretion in so doing.

The trial court also specifically found that the orthodontia expenses were post-June 2003 expenses. Ms. Boyd relies upon trial exhibit 6 to contest the trial court's finding. Trial exhibit 6 consists of two credit card receipts both in the amount of \$190.00, and both referencing Drs. Smith & Fewell. The first of these receipts bears the date 5/14/03; the second bears the date 5/28/03. Ms. Boyd contends that these receipts were for consultations for the children's braces. Neither receipt bears any reference to the services provided, nor any reference to the patient. Without the accompanying testimony, Ms. Boyd's argument concerning these two payments is unsupported. Consequently, we must conclude that the trial court's finding of fact was supported by the evidence adduced at the hearing. That being said, certain trial exhibits (e.g., collective exhibit 8) are itemized and dated. These exhibits support the trial court's determination that the expenses accrued post-June 2003.

#### **Modification of Child Support and Application of Income Shares Guidelines**

In her second and third issues, Ms. Boyd asserts that the trial court erred in applying the income shares child support guidelines rather than the prior child support guidelines, and in calculating Mr. Bates' adjusted gross income. We will first address the question of which child support guidelines model is applicable to this case. Ms. Boyd relies upon Tenn. Code Ann. § 36-5-101 and the case of *Rutledge v. Bartlett*, 802 S.W.2d 604 (Tenn. 1991). We note that Tenn. Code Ann. § 36-5-101 is a voluminous statute and Ms. Boyd does not indicate the specific section of the statute upon which she relies. In the absence of this information, we assume that the applicable portion of the statute is § 36-5-101(e)(1)(A) (Supp. 2007), which reads:

In making the court's determination concerning the amount of support of any minor child or children of the parties, the court shall apply, as a rebuttable presumption, the child support guidelines, as provided in this subsection (e). If the court finds that evidence is sufficient to rebut this presumption, the court shall make a written finding that the application of the child support guidelines would be unjust or inappropriate in that particular case, in order to provide for the best interest of the child or children, or the equity between the parties. Findings that the application of the guidelines would be unjust or inappropriate shall state the amount of support that would have been ordered under the child support guidelines and a justification for the variance from the guidelines.

Ms. Boyd's reliance upon *Rutledge* for the proposition that the income shares guidelines are not to be retroactively applied and cannot be applied to existing child support orders is misplaced as this case was decided some fourteen years prior to the effective date of the income shares guidelines.

The question of which support guidelines to apply when modifying an existing child support order is specifically addressed in the Tennessee Child Support Guidelines:

(1) Beginning on the effective date of these rules, all modifications shall be calculated under the Income Shares Guidelines, ***whether the action was pending before the effective date*** or filed after the effective date, ***where a hearing which results in an order modifying support is held after the effective date of these rules.***

Tenn. Comp. R. & Reg. 1240-2-4-.05(1) (emphasis added).

The income shares guidelines became effective on January 18, 2005. Ms. Boyd asserts that, because Mr. Bates' petition to modify was filed June 13, 2003, the trial court should not have applied the income shares model. We disagree. As set out above, the Tennessee Child Support Guidelines clearly state that the income shares guidelines can apply to actions pending before the effective date, provided that the hearing on the petition to modify is held after the effective date. Therefore, the applicability of the income shares guidelines does not depend on the date on which the petition to

modify is filed. Rather, it depends on the date of the hearing that results in an order modifying support. In this case, the hearing on Mr. Bates' petition to modify took place after the effective date of the income shares provisions of the Child Support Guidelines. The trial court conducted its hearing on this issue on February 10, 2005 and concluded that the income shares guidelines were applicable. Under the plain language of Tenn. Comp. R. & Reg. 1240-2-4-.05(1), the trial court correctly applied the income shares guidelines in this case.

Concerning Mr. Bates' adjusted gross income, and the modification of the support order, Tenn. Comp. R. & Reg. 1240-2-4-.05(2)(a) states that:

Unless a significant variance exists, as defined in this section, a child support order is not eligible for modification; provided, however, the necessity of providing for the child's health care needs shall be a basis for modification regardless of whether a modification in the amount of child support is warranted by other criteria.

Tenn. Comp. R. & Reg. 1240-2-4-.05(2)(b) defines "significant variance," in pertinent part, as follows:

(b) For all orders that were established or modified before January 18, 2005, under the flat percentage guidelines, and are being modified under the income shares provisions for the first time, a significant variance is defined as:

1. At least a fifteen percent (15%) change in the gross income of the ARP; and/or

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5. At least a fifteen percent (15%) change between the amount of the current support order and the proposed amount of the obligor parent's pro rata share of the BCSO if the current support is one hundred dollars (\$100) or greater per month and at least fifteen dollars (\$15) if the current support is less than one hundred dollars (\$100) per month...

The Tennessee Child Support Guidelines define adjusted gross income, in relevant part, as follows:

Gross income of each parent shall be determined in the process of setting the presumptive child support order and shall include all income from any source (before deductions for taxes and other

deductions such as credits for other qualified children), whether earned or unearned....

Tenn. Comp. R. & Reg. 1240-2-4-.04(3)(a)(1).

Ms. Boyd asserts that Mr. Bates' tax returns for the years 2001 through 2003 show a reported income of approximately \$50,000 while the deposits into his personal checking accounts range from \$191,569.00 to \$338,254.33 for those years. Ms. Boyd contends that Mr. Bates was withholding capital gains and dividends from his tax returns. The trial court based Mr. Bates' child support obligation on the adjusted gross income reported on his 2003 tax return, \$58,398. In light of the fact that there is no transcript nor statement of the evidence, the record simply does not support Ms. Boyd's argument that Mr. Bates failed to report capital gains and dividends totaling approximately \$30,000.00. Consequently, we cannot conclude that the trial court erred in relying upon Mr. Bates' tax returns in calculating his adjusted gross income.

#### **Attorney's Fees**

\_\_\_\_\_ Ms. Boyd asserts that the trial court erred in not awarding her attorney's fees. She states, among other things, that her attorney's fees were increased "as a result of Dr. Bates creating delays in not producing requested income documentation, resulting in motions to compel and a continuance of hearing."

Although a party may recover reasonable attorney fees incurred in enforcing any decree for alimony and/or child support, Tenn. Code Ann. § 36-5-103(c), this decision is within the sound discretion of the trial court and "will not be disturbed upon appeal unless the evidence preponderates against such a decision." *See, e.g., Kincaid v. Kincaid*, 912 S.W.2d 140, 144 (Tenn.Ct.App.1995); *see also* Tenn.R.App. P. 13(d).

The record before us indicates that both parties were guilty of delaying the adjudication of this case. During the pendency of this matter, Ms. Boyd changed attorneys four times. We conclude that the trial court did not abuse its discretion in denying Ms. Boyd's request for attorney's fees.

The order of the trial court is affirmed. Costs of this appeal are assessed to the Appellant, Marilyn S. Boyd, and her surety, for which execution may issue if necessary.

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J. STEVEN STAFFORD, JUDGE